

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7628

Joint Petition of Green Mountain Power Corporation,)
Vermont Electric Cooperative, Inc., and Vermont)
Electric Power Company, Inc. for a certificate of public)
good, pursuant to 30 V.S.A. Section 248, to construct up)
to a 63 MW wind electric generation facility and)
associated facilities on Lowell Mountain in Lowell,)
Vermont, and the installation or upgrade of)
approximately 16.9 miles of transmission line and)
associated substations in Lowell, Westfield, and Jay,)
Vermont)

Order entered: 9/27/2010

ORDER RE: DYER-DUNN, INC. MOTION TO ENLARGE TIME
TO SERVE DISCOVERY

In this Order, the Vermont Public Service Board ("Board") denies the request by Dyer-Dunn, Inc. ("DDI") that the Board enlarge the time for all parties to serve second round discovery requests on the Petitioners until September 27, 2010. As further explained below, the Board denies the request because DDI failed to follow procedural prerequisites before filing its motion, because its request is based on receipt of voluminous materials that it was not entitled to receive in the first instance, and because it does not have standing to raise such a request on behalf of other parties to this proceeding.

On September 20, 2010, DDI filed a letter request with the Board, asking that it and all other intervenors and parties have until September 27, 2010, to serve and file second-round discovery requests on the Petitioners. According to DDI, it had only just received copies of numerous documents from the Petitioners on Friday, September 17th, which would not allow it to read and draft follow-up discovery on these documents by the scheduled deadline of Monday, September 20th. DDI also contends that the burden of pursuing noise-related health issues imposed on it and other pro-se intervenors has overwhelmed them to the point of being unable to move discovery forward in a timely manner.

The Petitioners filed their opposition to DDI's motion on September 20, 2010. Petitioners contend that the motion should be denied because: (1) DDI failed to discuss its request with Petitioners prior to filing a motion with the Board; (2) the documents DDI relies upon in its motion are outside the scope of DDI's intervention and therefore its scope of discovery; and (3) Petitioners were not even required to respond to DDI's first set of information requests because the date for service passed prior to DDI being granted intervention. Lastly, Petitioners state that any delay in the proceeding should be limited only to those documents delivered on September 17, 2010, and not any other discovery topics.

DISCUSSION

DDI's motion is denied for the reasons discussed herein. First, DDI failed to follow procedural requirements prior to filing its motion seeking relief. Vermont Rule of Civil Procedure 26(h), which is applicable to Board proceedings pursuant to Board Rule 2.214(A), requires that a party seeking relief related to discovery to make good-faith efforts with opposing counsel to resolve differences related to discovery procedures to avoid filing unnecessary motions.¹ Rule 26(h) requires that discovery motions be accompanied by an affidavit or attorney's certificate confirming the good-faith efforts. DDI's motion did not include the required affidavit or certificate. According to Petitioners, no such effort was made by DDI, and the first Petitioners heard of DDI's request was by copy of an e-mail to the Clerk of the Board on September 17, 2010. The requirement to consult with opposing counsel is not discretionary, it is a prerequisite to the filing of a discovery-related motion, and its purpose is to avoid the filing of unnecessary motions. In the instant case, DDI's lack of action is particularly troubling since Petitioners have apparently made accommodation to at least one other party that sought some additional time to serve its second round of discovery.

Second, according to Petitioners, the documents that DDI received on September 17, 2010, relate to natural-resource impacts regarding bird and bat studies, plant species and

1. V.R.C.P. 26(h).

wetlands identification, areas for which DDI was denied party status.² In its September 3, 2010, order, the Board concluded that DDI had not demonstrated a particularized interest with respect to the natural environment, although the order does allow DDI to address impacts to the spring-fed stream that serves the cabin on the property.³ Assuming Petitioners' description of the documents delivered on September 17th is accurate, we conclude that they contain subject matter that pertains to topic areas for which DDI was not granted intervention. Accordingly, there would be no need for DDI to read and digest the information in order to draft its discovery requests.

Additionally, Petitioners accurately point out that they were not under an obligation to respond to DDI's first round of discovery requests at all. The Board's July 14, 2010, Prehearing Conference Memorandum and Scheduling Order made it clear that any potential party that wished to participate in the first round of discovery should file a motion to intervene early enough to allow time for responses to be filed and a Board order to issue prior to the August 20, 2010, deadline for serving round-one discovery requests.⁴ DDI did not file its motion to intervene until August 13, 2010. The five-business-day time period for responding meant it was impossible for the Board to grant DDI party status in time for it to participate in round-one discovery. In spite of its lack of party status, DDI served round-one discovery on Petitioners on August 20, 2010, well before its grant of party status on September 3, 2010. Rather than object, Petitioners provided DDI with responses on the scheduled date of September 10, 2010, and according to Petitioners, subsequently produced documents unrelated to DDI's party status on September 17, 2010. DDI has no standing to complain at this time. It was granted party status in time to draft discovery prior to the round-two deadline of September 20, 2010. The fact that it received additional documents in response to questions that it had no standing to ask is not grounds to rewrite the schedule to accommodate DDI's asserted needs.

Third, DDI inexplicably has asked that all other intervenors and parties be allowed until September 27, 2010, to serve their second-round discovery on Petitioners. DDI has no standing

2. The Petitioners state that the documents were provided as an accommodation to DDI and should not be the basis for introducing delay in the docket schedule.

3. Docket 7628, Order of 9/3/10 at 14.

4. Docket 7628, Order of 7/14/10 at 3.

to make such a request. Indeed, many of the other parties appear to have already served their second-round discovery in a timely fashion, rendering that portion of DDI's request moot.

As a final matter, we note that in its motion to intervene, DDI stated, "Appearance and participation by D-D, Inc. will readily fit into the time lines established by the PSB schedule without causing delay and will enhance the interests of the public in the preservation of the natural beauty of Vermont."⁵ DDI's virtually unsupported request to enlarge the schedule at this early phase of the proceeding stands in stark contrast to its representations in its motion to intervene. In the future, we expect DDI to adhere to those representations, which were relied upon by the Board in granting DDI party status, absent significant and compelling reasons warranting a deviation from the established schedule.

SO ORDERED.

5. DDI, Motion to Intervene dated 8/13/10 at 5.

Dated at Montpelier, Vermont, this 27th day of September, 2010.

<u>s/ James Volz</u>)	
)	PUBLIC SERVICE
)	
<u>s/ David C. Coen</u>)	BOARD
)	
)	OF VERMONT
<u>s/ John D. Burke</u>)	

OFFICE OF THE CLERK

FILED: September 27, 2010

ATTEST: s/ Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)